

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-1165

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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JOHN GALANTE,

Appellant-Defendant,

Docket #76-1165

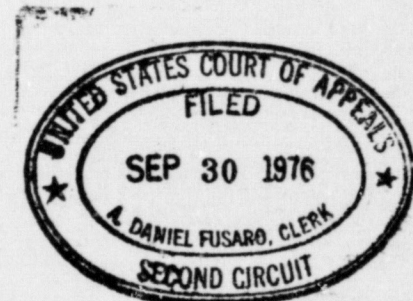
-against-

UNITED STATES OF AMERICA, :

Respondent.

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REPLY BRIEF FOR APPELLANT GALANTE



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UNITED STATES COURT OF APPEALS
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Docket #76-1165
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REPLY BRIEF FOR APPELLANT GALANTE

Appellant John Galante submits this memorandum of law in reply to the answering brief of the government.

With an obvious lack of enthusiasm, the government says mildly and meekly that Judge Judd was correct in denying the suppression application with respect to the search warrant. The government concedes it can not "press the issue in light of the holding in United States v. Karathanos, 531, F. 2d 26 (CA-2, 1976)".

In addition to conceding that Karathanos supports Galante's position that the District Court erred, the government cites no other case or authority in support of the position of the District Court in an effort to find the supporting affidavit sufficient. The government makes neither

the legal argument nor a factual argument with regard to the supporting affidavit of FBI agent Charles Boling, and in no way attempts to answer the appellant's contention that there is nothing in the information furnished by the informant to the agent to show that the information was "reliable", and was not merely a tip, hearsay, or pure fiction.

It is obvious that the government has thrown all the weight behind its contention that Galante lacks standing with regard to the suppression application. The District Court was not troubled by the alleged lack of standing of Galante, and decided the motion on the issue of the sufficiency of the search warrant application. The government will now have this court take a completely reverse position, and avoid the sufficiency of the warrant argument by focusing solely on the standing issue, in spite of the position of the District Court.

Basically the government asks this court to overrule the Supreme Court of the United States, and its decision in Jones (362 US 257, 263-264). In this regard the government ignores the long line of cases from both the high court and this court, cited at page 12 of Galante's brief, namely, Price, (447 F.2d 23, 29); Pastore, (456 F. 2d 99), Simmons, (390 US 377), and even Brown, 411 US 223, 228-229.

The government cannot point to a single opinion of either this

court or the Supreme Court in support of its position. All the government could do is rely upon a law review article - scholarly to be sure - authored by David Trager, the United States Attorney, at the time when he was a law professor at the Brooklyn Law School. However, this very same David Trager made the exact argument to this court in 1972 in United States v. Pastore, 456 F. 2d, 99, at a time when he was the Chief Appellate attorney for the United States Attorney. The panel of this court rejected that argument and affirmed on the lengthy unreported opinion of Chief Judge Jacob Mishler, 70 CR 586-EDNY (3/26/71). Judge Mishler had considered and rejected the arguments of David Trager in a twenty-three page unreported opinion, copy of which will be furnished to this court at the time of oral argument if the panel so wishes.

At this moment the law of this circuit is crystal clear. When the search and seizure takes place during the period of time covered by the indictment, on a possession charge, the defendant has standing to move to suppress on a claim of an illegal search and seizure. The indictment charges possession during the period from March 31st to April 11th. The contested search and seizure took place during this period of alleged possession. Until such time as the Solicitor General can convince the Supreme Court to change the law, this court is powerless to hold that Jones or any other decision of the Supreme Court is not to be followed. Furthermore, the position of this circuit, as spelled out in Pastore

and Price, binds this panel to the law as spelled out on standing. Any change in the law will have to come in another forum at another day. Professor Trager makes a telling argument in his law review article as what the law should be, rather than what it is. However, in his position as an attorney representing a party in this court, he is bound by the law of the circuit, and of the high court, and just cannot enjoy the same liberties as one who writes a law review article.

Inasmuch as the government virtually concedes that the supporting affidavit as to the search warrant was insufficient, and inasmuch as the law of standing is dead set against the government, it is clear that the District Court erred when it denied the motion to suppress. The introduction of the seized contraband was indeed a potent piece of evidence and undoubtedly played an important role in the jury's determination of guilt.

Dated: September, 1976

Respectfully submitted,

H. ELLIOT WALES
Counsel for Appellant Galante

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOHN GALANTE,

Plaintiff

against

UNITED STATES OF AMERICA,

Defendant

Index No.

Docket #76-1165

AFFIDAVIT OF SERVICE
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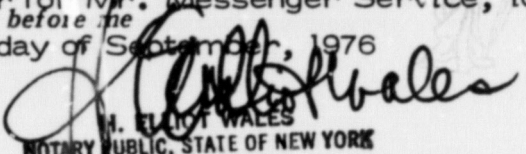
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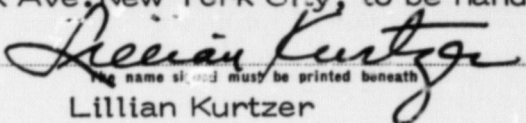
The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
Queens, New York.

That on September 30th 1976 deponent served the annexed

on United States Attorney Reply Brief for Appellant Galante
attorney(s) for Respondent
in this action at U.S. Courthouse, 225 Cadman Plaza East, Brooklyn, N. Y. 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid envelope addressed to the post office official depository under the exclusive care
and custody of the United States Postal Service within the State of New York, hand delivering to a
messenger for Mr. Messenger Service, 103 Park Ave. New York City, to be hand delivered.
Sworn to before me
this 30th day of September, 1976


H. ELLIOT WALES
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4129915
Qualified in Kings County
Commission Expires March 31, 1979


The name signed must be printed beneath
Lillian Kurtzer

Index No.

against

Plaintiff

Defendant

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19

deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

